



# UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE  
United States Patent and Trademark Office  
Address: COMMISSIONER FOR PATENTS  
P.O. Box 1450  
Alexandria, Virginia 22313-1450  
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
-----------------	-------------	----------------------	---------------------	------------------

10/585,198

01/03/2008

Thomas Landazuri

KOB

6182

7590

02/16/2011

James C. Wray  
1493 Chain Bridge Road  
Suite 300  
McLean, VA 22101

EXAMINER

MUKHOPADHYAY, BHASKAR

ART UNIT

PAPER NUMBER

1789

MAIL DATE

DELIVERY MODE

02/16/2011

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>	
	10/585,198	LANDAZURI, THOMAS	
	<b>Examiner</b>	<b>Art Unit</b>	
	BHASKAR MUKHOPADHYAY	1789	

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 16 September 2010.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-16 is/are pending in the application.
- 4a) Of the above claim(s) 11-15 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-10 and 16 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)            | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftperson's Patent Drawing Review (PTO-948)    | Paper No(s)/Mail Date. _____                                      |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date <u>3/27/2006</u>   | 6) <input type="checkbox"/> Other: _____                          |

## **DETAILED ACTION**

### **Election/Restriction**

1. Claims 11-15, i.e. group II, are withdrawn from further consideration pursuant to 37 CFR 1.142(b), as being drawn to a nonelected invention there being no allowable generic or linking claim. Applicant timely traversed the restriction (election) requirement in the reply filed on 9/16/2010.

2. Applicant's election with traverse of group I, claims 1-10, and 16 in the reply filed on 9/16/2010 is acknowledged. The traversal is on the ground(s) that Groups I and II are not distinct inventions since a search for one would also encompass a search for another.

This is not found persuasive because the restriction is proper based on the concept of 'unity of invention'. Groups I and II share a special technical feature which is why the examiner properly established that the special technical feature does not provide a contribution over the prior art to establish lack of unity. Thus, the restriction requirement is proper. See MPEP 1850[R-7].

Applicants argue that the examiner has not stated that there would be serious burden if restriction were not required. However, this is not found persuasive because the instant application is a national stage entry filed under 35 U.S.C. 371 and is therefore not subject to US restriction practice but rather subject to lack of unity

Art Unit: 1789

practice, see MPEP 1893.03(d). It is noted that undue search burden is not a criterion in lack of unity analysis. The test is whether or not special technical features can be established. It is noted that inventions listed as Groups I and II do not relate to a single general inventive concept under PCT Rule 13.1 because, under PCT Rule 13.2, they lack the same or corresponding special technical features as set forth in paragraph 5 of the previous Office Action.

The two way distinctiveness required by 806.05 (c) as mentioned by the applicant (page 3, Remarks), is applicable for US restriction but not for the 371 restriction which is based on the concept of unity of invention.

Therefore, the requirement is still deemed proper and is therefore made FINAL.

### **Claim Rejections - 35 USC § 103**

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Art Unit: 1789

4. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

- a. Determining the scope and contents of the prior art.
- b. Ascertaining the differences between the prior art and the claims at issue.
- c. Resolving the level of ordinary skill in the pertinent art.
- d. Considering objective evidence present in the application indicating obviousness or nonobviousness.

5. Claims 1, 10, and 16 are rejected under 35 U.S.C. 103(a) as being unpatentable over Cochran, USPN 4260643 in view of McDonald et al., USPN 3030211.

6. Regarding claims 1, 10, and 16, Cochran discloses cream filler composition (col 9, line 52-col 10, line 11) for food applications e.g. roll-in pastries, roll-in shortenings, puff pastries (col 12, lines 5-10) having sweetener e.g. powdered sugar (col 9, lines 52-60), trisaturated glycerides, from 5-20%, of 40-55% triglycerides i.e. 2% (5x40= 2%) to 11% (20x 55= 11%) trisaturated glycerides and **extremely low amount of liquid oil at room temperature (col 4, lines 30-35) in the composition**. It is obvious that liquid oil at room temperature possesses SFI of zero and is selected from vegetable oil. There is no disclosure of partially hydrogenated fat fraction, however, the claimed partially hydrogenated fat fraction is not required, i.e. 0%.

Cochran, however, does not teach about the “increased gliadin content” in the composition.

McDonald teaches that the amount of gliadin can be added in butter cream type frosting and use of gliadin as deamidized gliadin in the composition (col 4, lines 50-65). McDonald also teaches about convenient source of gliadin is gum gluten obtained from wheat and comprises about one-half the protein and gliadin can be isolated by extraction with alcohol (col 1, lines 45-50). It is well known that gluten contains gliadin and glutenin. It is obvious that the extracted product contributes predominantly gliadin, and therefore, after extraction the wheat gluten fraction would have an increased gliadin content as claimed in claim 1. The motivation is smoother texture, higher gloss, and improved stability (col 2, lines 25-32).

Regarding claim 10, although Cochran in view of McDonald do not disclose the presently claimed method, it is noted that “[E]ven though product-by-process claims are limited by and defined by the process, determination of patentability is based on the product itself. The patentability of a product does not depend on its method of production. If the product in the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process”, *In re Thorpe*, 777 F.2d 695, 698, 227 USPQ 964, 966 (Fed. Cir. 1985). Further, “although produced by a different process, the burden shifts to applicant to come forward with evidence establishing an unobvious difference between the claimed product and the prior art product”, *In re Marosi*, 710 F.2d 798, 802, 218 USPQ 289, 292 (Fed. Cir.1983). See MPEP 2113.

Therefore, absent evidence of criticality regarding the presently claimed process and given that Cochran in view of McDonald meets the requirements of the claimed

Art Unit: 1789

composition, Cochran in view of McDonald clearly meet the requirements of present claim 10.

It would have been also obvious to one of ordinary skill in the art to include the teaching of McDonald into Cochran. One of ordinary skill in the art would have been motivated to use deamidized gliadin in order to achieve smoother texture, higher gloss, and improved stability (col 2, lines 25-32).

7. Claims 1, 2-4, 7-10, and 16 are rejected under 35 U.S.C. 103(a) as being unpatentable over Porcello et al., USPN 4865859 in view of McDonald et al., USPN 303021.

8. Regarding claims 1, 2-4, 7- 10, and 16, Porcello et al., discloses cream filler composition (col 10, line 11) for sandwich cookies and other foods ( Abstract) having lipid fraction composed of vegetable oils like from 25 to about 75 % by wt. cottonseed oil (col 4, lines 63-65), from about 10-55 % by wt. soybean oil (col 4, line 39). Porcello also teaches about soybean oil can be mixed with cottonseed oil (col 4, lines 32-35) or rapeseed oil (col 5, line 41). It is clear that these oils are liquid oil at room temperature possesses SFI of zero and is selected from vegetable oil and therefore it is also clear that the composition is free from saturated fat i.e. meets claimed limitation of 0% saturated fat as claimed in claim 1.

Porcello et al., disclose about optionally the oils may be partially hydrogenated (col 4, line 34 e.g. "may be modified") and therefore, meet the presently claimed

Art Unit: 1789

limitation that partially hydrogenated fat fraction is not required, i.e. 0%. It is well known that with natural vegetable oil e.g. soybean oil without partial hydrogenation having SFI of about zero at room temperature (25 degree C) to meet claims 2 and 3 as presently claimed.

Porcello et al., also teach about filler cream composition contain more than about 60% by wt of sugar and the sugar may be pre ground ( col 5 lines 50-52; col 6, lines 1-5).

Porcello et al., however, do not teach about the "increased gliadin content" in the composition.

McDonald teaches that the amount of gliadin can be added in butter cream type frosting and use of gliadin as deamidized gliadin in the composition (col 4, lines 50-65). It is clear that the amount of gliadin 0.1-5% (col 3, line 40) in the composition can be obtained from twice the amount of gluten from wheat as gliadin comprises one half of the protein in gum gluten ( col 1, lines 45-50) and that extracted gliadin by alcohol extraction from wheat gluten ( col 1, lines 45-50) contributes predominantly gliadin. Therefore, this would intrinsically increase the amount of gliadin content compared to natural gliadin content in wheat gluten, with the negligible other protein e.g. glutenin and therefore, gliadin /glutenin ratio is definitely more than 3 to meet claims 7 -9. The motivation is smoother texture, higher gloss, and improved stability (col 2, lines 25-32).

Regarding claim 10, although Porcello et al. in view of McDonald do not disclose the presently claimed method, it is noted that "[E]ven though product-by-process claims are limited by and defined by the process, determination of patentability is based on the



Art Unit: 1789

product itself. The patentability of a product does not depend on its method of production. If the product in the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process”, *In re Thorpe*, 777 F.2d 695, 698, 227 USPQ 964, 966 (Fed. Cir. 1985). Further, “although produced by a different process, the burden shifts to applicant to come forward with evidence establishing an unobvious difference between the claimed product and the prior art product”, *In re Marosi*, 710 F.2d 798, 802, 218 USPQ 289, 292 (Fed. Cir.1983). See MPEP 2113.

Therefore, absent evidence of criticality regarding the presently claimed process and given that Porcello et al. in view of McDonald meets the requirements of the claimed composition, McDonald clearly meet the requirements of present claim 10.

It would have been also obvious to one of ordinary skill in the art to include the teaching of McDonald into Porcello et al. One of ordinary skill in the art would have been motivated to use deamidized gliadin in order to achieve smoother texture, higher gloss, and improved stability (col 2, lines 25-32).

9. Claims 7- 9 are rejected under 35 U.S.C. 103(a) as being unpatentable over Porcello et al., USPN 4865859 as applied to claim 1, and further in view of Yajima, USPN 4911942.

10. Regarding claims 7-9, Porcello et al., discloses cream filler composition (col 10, line 11) having lipid fraction composed of vegetable oils like about 60% by wt.

Art Unit: 1789

cottonseed oil, from about 33% to 18% by wt. soybean oil, and about 18% to 33% by wt. of palm kernel oil (col 4 lines 32-36; 65-67 and col 5 lines 1-5). It is clear that vegetable oil e.g. soybean liquid oil intrinsically possess SFI of zero at room temperature and is a vegetable oil. Porcello et al., disclose about optionally the oils may be partially hydrogenated ( col 4, line 34 e.g. "may be modified") and therefore, meet the presently claimed limitation that partially hydrogenated fat fraction is not required, i.e. 0%. It is well known that with natural vegetable oil e.g. soybean oil without partial hydrogenation having SFI of about zero at room temperature (25 degree C) to meet claims 2 and 3 as presently claimed.

Porcello et al., also teach about filler cream composition contain more than about 60% by wt of sugar and the sugar may be preground ( col 5 lines 50-52; col 6, lines 1-5).

Porcello et al., do not teach about the "increased gliadin content" in the composition.

Yajima teaches that viscosity results from gliadin and the elasticity results from glutenin (col 3, lines 9-11). One of ordinary skill in the art would have been motivated to use gliadin/glutenin ratio at least 2.0, 2.5, 3.0 in order to achieve the desired viscoelastic (organoleptic) property and highly stabilized oil composition ( col 4, lines 65-67) in the final product. Yajima, however, do not specifically mention the gliadin/glutenin ratio in the composition as claimed in claims 7-9.

Since the instant specification is silent to unexpected results, the specific ratio of gliadin/glutenin is not considered to confer patentability to the claims. As the

Art Unit: 1789

viscoelastic property and stability are variables that can be modified, among others, by adjusting the amount of gliadin/glutenin, the precise amount would have been considered a result effective variable by one having ordinary skill in the art at the time the invention was made. As such, without showing unexpected results, the claimed amount cannot be considered critical. Accordingly, one of ordinary skill in the art at the time the invention was made would have optimized, by routine experimentation, the amount of gliadin/glutenin in Yajima to amounts, including that presently claimed, in order to obtain the desired effect e.g. viscoelastic property and stability etc. (In re Boesch, 617 F.2d. 272, 205 USPQ 215 (CCPA 1980)), since it has been held that where the general conditions of the claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art. (In re Aller, 105 USPQ 223).

11. Claims 5-6 are rejected under 35 U.S.C. 103(a) as being unpatentable over Porcello et al., USPN 4865859 in view of McDonald et al., USPN 303021 as applied to claim 1, and further in view of Yost, USPN 5374438.

Porcello et al., USPN 4865859 in view of McDonald et al., do not teach about artificial sugar or the combinations of natural and artificial sugar in the cream filler composition.

Yost teaches about the use of natural sweetener or artificial sweetener or a mixture of these (col 6, lines 38-47) in an amount of 60- 65% (col 7 lines 11-15) in the composition to meet claims 5-6. The motivation is to provide sweet cream (col 6, line

Art Unit: 1789

37) and high density sandwich cookie with quick setting, less cooling to ease method of production and desired organoleptic properties in the composition (col 7 lines 11, 37-40, 42) and also use of artificial sweetener can enhance sweetening power with the addition of smaller amount to retain the texture and contributing least calkorie in the product.

It would have been obvious to one of ordinary skill in the art at the time of invention to include the teaching of Yost into Porcello et al., in view of McDonald. One of ordinary skill in the art would have been motivated to to provide sweet cream (col 6, line 37) and high density sandwich cookie with quick setting, less cooling to ease method of production and desired organoleptic properties in the composition (col 7 lines 11, 37-40, 42) and also use of artificial sweetener can enhance sweetening power with the addition of smaller amount to retain the texture and contributing least calkorie in the product.

### **Conclusion**

12. Any inquiry concerning the communication or earlier communications from the examiner should be directed to Bhaskar Mukhopadhyay whose telephone number is (571)-270-1139.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Callie Shosho can be reached on (571)-272- 1123. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for

Art Unit: 1789

published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/B.M. /

Patent Examiner, Art Unit 1789

/Callie E. Shosho/

Supervisory Patent Examiner, Art Unit 1787